

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
AMERICAN IMMIGRATION LAWYERS	)	
ASSOCIATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10-cv-01224-EGS
	)	
UNITED STATES DEPARTMENT OF	)	
HOMELAND SECURITY, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS’ REPLY TO PLAINTIFF’S OPPOSITION TO DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

The United States Department of Homeland Security (“DHS”), and the United States Citizenship and Immigration Services (“USCIS;” collectively, “Defendants”), a DHS subdivision, by and through undersigned counsel, respectfully reply to the opposition memorandum (“Opposition”) of the American Immigration Lawyers Association (“AILA” or “Plaintiff”) to Defendants’ cross-motion for summary judgment (“Cross-Motion”):

**I. THE INFORMATION AILA SEEKS HAS NOT BEEN OFFICIALLY DISCLOSED AND REMAINS SUBJECT TO THE FOIA.**

AILA erroneously argues that information redacted from the Compliance Review Report Form, H1-B Petition Fraud Referral Sheet, and the Neufeld Memorandum have been officially disclosed by Defendants and that the FOIA’s exemptions are therefore inapplicable. See Pl.’s Opp. at 5-11. AILA fails to show that the various methods by which it claims the redacted information has come to light constitute official disclosures under the law of this Circuit.

Disclosure is rendered official and results in waiver of FOIA exemptions only if the information is made public as part of a “documented disclosure” under circumstances in which

an authoritative government official allowed the information to be publicized. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see Wolf v. CIA, 473 F.3d 370, 379-80 (D.C. Cir. 2007). Moreover, AILA must also show that the information it seeks is “as specific as” or “matches” the information it alleges is already part of the public domain. Public Citizen v. Dep’t of State, 11 F.3d 198, 203 (D.C. Cir. 1993). AILA has not satisfied these rigorous evidentiary requirements.

**A. Compliance Review Report Form**

AILA alleges that the Compliance Review Report Form must be released in full because Defendants have released an instruction sheet for an earlier version of the Form. See Pl.’s Opp. at 5-6. The only “official disclosures” made, however, are the redacted Compliance Review Report Form (rev. Jun 19, 2009) (Pl.’s Exh. 12), and the instructions that postdate the Form. That AILA claims “another version” of the instructions is publically available is not enough to satisfy the public-domain doctrine with respect to disclosure of the Form itself – AILA must show that the information contained in the Form matches publically available information. The fact that different versions of instructions pertaining to a document AILA seeks may have been publically disclosed – whether officially or unofficially – does not entitle AILA to obtain all information contained in subsequent versions of the document.

Further, AILA’s allegation that “the questions covered in the instructions also correspond” to other publically available sources is misleading and inaccurate. Id. at 6. The web address AILA cites provides a brief, general description of the Administrative Site Visit and Verification Program, which can be said to “correspond” to the instructions for the Compliance Review Report Form only in the most abstract sense that both sources of information relate to

what occurs at a site visit. Id. at 6-7. AILA has failed to show the requisite degree of specificity that would trigger waiver of a FOIA exemption under the public-domain doctrine.

**B. H1-B Petition Fraud Referral Sheet**

AILA next claims that the H1-B Fraud Referral Sheet has been officially disclosed because a FOIA litigant in a separate FOIA action submitted a different version of the Sheet AILA seeks here. Pl.'s Opp. at 9. That mechanism of disclosure is not remotely "official" as the D.C. Circuit understands the term. Moreover, that Defendants cited the disclosed version of the Sheet in that separate lawsuit in order to make out their case for asserting exemptions under the FOIA in no way amounts to agency acquiescence in the improper disclosure or renders it an "official republication," as AILA creatively claims. Id. AILA's argument on this score is especially odd given its admission that AILA itself – not Defendants – was responsible for publishing the Sheet after a USCIS employee had inadvertently "left" it at an AILA member's "location" and then requested that AILA cease publication of the document. Id. No interpretation of AILA's own version of how a predecessor version of the Sheet came to be publicized can plausibly be characterized as an "official" disclosure by Defendants.

**C. Neufeld Memorandum**

Weaker still, AILA claims with respect to the Neufeld Memorandum that some redacted information it contains "appears" to "relate to primary fraud indicators." Id. at 10. AILA bolsters its surmise with the assertion that the Neufeld Memorandum may contain publically available information because it postdates the BFCR Report, which, like the Neufeld Memorandum, also addresses fraud indicators.

AILA's suspicions are too flimsy to satisfy the public-domain doctrine. AILA must show with specificity how the precise information the Neufeld Memorandum contains is public and

has been officially disclosed. It has not done so. A guess about the contents of the Neufeld Memorandum based on the timing of its release relative to the BFCA Report is far too tenuous to require release of the withheld information.

**D. “Newly-Identified Documents”**

AILA alleges that Defendants must release publically available information contained in unspecified “Newly-Identified Documents” even though it has made no showing whatsoever that any such documents are subject to the public-domain doctrine. The mere invocation of the doctrine based on pure speculation does not invalidate Defendants’ detailed declarations justifying the withheld information.

**CONCLUSION**

For the reasons set forth above, Defendants respectfully request that the Court grant summary judgment in their favor on all claims AILA raises in this action.

Dated: August 4, 2011

Respectfully Submitted,

RONALD C. MACHEN JR., D.C. Bar #447889  
United States Attorney  
for the District of Columbia

RUDOLPH CONTRERAS, D.C. Bar #434122  
Chief, Civil Division

BY: /s/ David C. Rybicki  
DAVID C. RYBICKI, D.C. Bar #976836  
Assistant United States Attorney  
555 4th Street, N.W.  
Washington, D.C. 20530  
Ph.: (202) 353-4024  
Fax: (202) 514-8780

Of Counsel:

Eric N. Banks, Esq.

Associate Counsel, Office of Chief Counsel

U.S. Citizenship & Immigration Services

U.S. Department of Homeland Security